Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM F. HARGROVE, JR.

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent(s).

On Petition For Writ Of Certiorari To The Supreme Court Of North Carolina

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is written notice to a respondent in a commitment proceeding waived by the appearance of a court appointed attorney?

II. Can a respondent's presence at hearing in a commitment proceeding be waived without his consent or showing of cause by a court appointed attorney?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, William F. Hargrove Jr., respectfully prays this Court grant a Writ of Certiorari to review the order of the Supreme Court of North Carolina entered in the above-entitled proceeding on July 22, 1999.

OPINIONS BELOW

The July 22, 1999, Order of the Supreme Court of North Carolina denying the Petitioner Certiorari is reprinted in the Appendix (hereinafter "App.") hereto, p. 1.

The March 10, 1999, Order of the Supreme Court of North Carolina dismissing the Petitioner's Appeal of Right based on an asserted violation of rights under the Constitution of the United States is reprinted at App. 3.

The December 15, 1998 ruling and opinion of the North Carolina Court of Appeals affirming the Trial Court's denial of the Petitioner's Motion for Appropriate Relief is reprinted at App. 7.

The January 12, 1997 Order of the Orange County District Court (hereinafter "Trial Court") denying the Petitioner's Motion for Appropriate Relief for a Rehearing based on an asserted violation of rights under the Constitution of the United States is reprinted at App. 15.

The January 6, 1995 Order of the Trial Court for involuntary commitment of the Petitioner is reprinted at App. 17.

JURISDICTION

The Order of the Supreme Court of North Carolina issued on July 22, 1999. The jurisdiction of this Court to review the Order of that court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourteenth Amendment to the Constitution of the United States, North Carolina Rules of Civil Procedure 4(j) and 60(b), North Carolina General Statute (hereinafter "N.C. GEN. STAT.") § 122C-53(c), N.C. GEN. STAT. § 122-C54(d), N.C. GEN. STAT. § 122C-264(c), N.C. GEN. STAT. § 122C-268(d), N.C. GEN. STAT. § 122C-268(e), and N.C. GEN. STAT. § 122C-268(f). The Amendment, Rules, and Statutes are reprinted at App. 24-29.

STATEMENT OF THE CASE

A. THE FACTS

The Petitioner walked into the Orange County Sheriff's Office in Hillsborough, North Carolina at roughly 8:30 AM on December 27, 1994. He was placed under arrest by Deputy Charles S. Blackwood a few moments later. Blackwood then filed a petition for involuntary commitment and sworn notarized affidavit with the Trial Court. Blackwood's affidavit read: "RESPONDENT HAS BEEN TO CHAPEL HILL POLICE DEPARTMENT AND

ORANGE COUNTY SHERIFF'S DEPARTMENT AND SAID HE HAS A LETTER THAT MIGHT EXPLODE. HE IS HIGHLY AGITATED. HE HAS BEEN QUITE VOCAL ABOUT THE BOMB. HE IS A POTENTIAL THREAT TO THE PUBLIC AS WELL AS HIMSELF" (R p 4). Shortly after arrest, the Petitioner was transported to UNC Memorial Hospital at Chapel Hill by Deputy Larry D. Tabor (R pp 6-7). He was examined there at 10 AM by psychiatrist Dr. Bruce Bryan Hughes. Hughes thereafter filed a standard certificate of examination which included a sworn notarized affidavit with the Trial Court. Hughes stated on the certificate that in his opinion the Petitioner was mentally ill and dangerous to himself and others. His affidavit read: "45 YOU BROUGHT IN UNDER PETITION AFTER THREATENING TO BLOW UP SHERIFF'S OFFICE. PT. APPEARS MANIC AND IS CLEARLY PSYCHOTIC." (R pp 8-9). At 9AM the next morning, December 28, 1994, the Petitioner was examined again. This examination was conducted by psychiatry resident Dr. Susan J. Meland. Meland also filed a certificate with sworn notarized affidavit with the Trial Court stating that in her opinion the Petitioner was mentally ill and dangerous to himself and others. Her affidavit read: "45 YO WHITE MALE WITH BIPOLAR DISORDER. MANIC WITH NO PRIOR HOSPITALIZATION. THREATENS TO BOMB BUILDING, RAPE STAFF, HIT STAFF." (R pp 10-11). Deputy Blackwood's petition and the two psychiatrist's certificates fulfilled North Carolina statutory requirements of probable cause for involuntary commitment.

The Trial Court consequently calendared a hearing and appointed Karen K. Murphy to represent the

Petitioner on January 3, 1995 (R p 12). The hearing took place on January 6, 1995 at UNC Memorial Hospital. App. 17-21. The exact sequence of events at the hearing is impossible to determine because it was not recorded either by stenographic or electronic means. At some point an unsworn written statement, dated January 4, 1994, and signed by Dr. Meland, was introduced as evidence in support of the Petitioner's commitment. App. 22-23. The circumstances of its introduction to the Trial Court are unclear. There is no indication that Dr. Meland appeared at the hearing (R pp 15-16) and the statement inexplicably was not filed with the Trial Court until January 11, 1995 (R p 13). However, it does seem clear and has been assumed throughout the subsequent proceedings that Murphy made no objection to the admission of Meland's statement into evidence. It also seems clear and has been assumed subsequently that Murphy presented no evidence in the Petitioner's defense because Meland's statement comprises the totality of the Trial Court's findings of fact. The result of the January 6, 1995 hearing however, is certain irrespective of how it was reached. The Trial Court concluded that the Petitioner was mentally ill and dangerous to others, followed the recommendation of Meland's statement and entered an order for involuntary commitment of the Petitioner for 15 days as an inpatient to be followed by 75 days as an outpatient. App 20.

The Petitioner was absent from the hearing and disputes the Trial Court's findings with respect to Meland's statement. However, the resolution of disputed facts is not the concern of this Court. That issue is the proper domain of the Trial Court in the event this Court remands the case.

The concern of this Court should be the asserted violation of the Petitioner's rights as set forth in the Fourteenth Amendment of the Constitution of the United States by the Trial Court.

Specifically, the facts of the case establish multiple violations of the Petitioner's rights under the due process clause: The Trial Court ignored the Petitioner's right to be represented by an attorney of his choice pursuant to N.C. Gen. Stat. § 122C-268(d), by appointing Murphy without his knowledge or consent (R p 12). Next, the Trial Court omitted service of process as required by N.C. Gen. Stat. § 122C-264(c), and thereby violated the Petitioner's constitutional right of written notice of the January 6, 1995 commitment hearing (R pp 4-11). Then, albeit fully in accordance with N.C. Gen Stat. § 122C-268(e), the Trial Court allowed Murphy to waive the Petitioner's presence at the hearing without his consent, and with no showing of cause, even though he was an inpatient at the hospital where the hearing took place. App. 17. Lastly, the Trial Court denied the Petitioner's constitutional right to confront the evidence against him as set forth in N.C. Gen. Stat. § 122C-268(f), by allowing Murphy to waive that right at hearing in his absence and with no indication of his wish.

It is incontrovertible that the Petitioner was fully capable of making informed decisions on his own behalf throughout the time he was represented by court appointed counsel. A summary note written by attending physician Dr. John Gilmore states that the Petitioner exhibited no symptoms of mental illness from January 3, 1995 to January 11, 1995 when he was discharged from the hospital (R p 46). Gilmore came on duty as the Petitioner's

attending physician on January 3, 1995, coincident with the date of Murphy's appointment by the Trial Court (R p 12).

B. PROCEEDINGS IN THE COURTS BELOW

The Petitioner filed written Motion for Appropriate Relief with the Trial Court on November 15, 1997[1] (R p 31). The relief sought was a rehearing of the commitment proceeding of January 6, 1995. The stated grounds were that a waiver of a respondent's presence at a commitment proceeding by a court appointed attorney without showing of cause or consent, albeit in accordance with N.C. Gen. Stat. § 122C-268(e), violated the Petitioner's right to due process under the Fourteenth Amendment of the Constitution of the United States. Oral argument by the Petitioner and state were made at hearing on December 12, 1997. The Trial Court subsequently entered an order

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[1] The delay is not because of any lack of zeal or omission on the Petitioner's part. An examination of the record shows absolutely nothing but continuous, patient, and unremitting effort in a series of correspondence, filings, and appearances dating from January 24, 1995 (R p 17) to November 14, 1996 (R p 25). The first is typical and most noteworthy. The Petitioner filed written motion Pro Se with the Trial Court to obtain a copy of the commitment order nine days after discharge from the hospital on January 24, 1995 (R p 17). This was necessary because court files for commitment proceedings pursuant to N.C. Gen. Stat. § 122C-54(d) are not public record and cannot be accessed by anyone, including the individual committed, except on written motion and showing of cause. The Trial court allowed the Petitioner's motion with reasonable dispatch on February 15, 1995 (R p 18). Nonetheless direct appeal was thereby precluded because it was more than 30 days since the January 6, 1995 hearing.

denying the Petitioner's motion on January 12, 1998. App. 15-17.

The Petitioner timely filed Notice of Appeal of the Trial Court's denial with the North Carolina Court of Appeals on January 21, 1998 (R p 57). On appeal, the Petitioner made four assignments of error. First, the omission of statutory notice prior to the commitment hearing as required by N.C. Gen. Stat. § 122C-264(c) violated his right to due process under the Fourteenth Amendment. Second, the waiver of his presence at the commitment hearing, while fully in accordance with the N.C. Gen. Stat. § 122C-268(e), violated his right to due process under the Fourteenth Amendment. Third, the waiver of his right to confront and cross-examine witnesses at the commitment hearing as set forth in N.C. Gen. Stat. § 122C-268(f) violated his right to due process under the Fourteenth Amendment. Fourth, the Trial Court erred in denying his motion for relief on the ground that it was not timely filed (R p 59).

The North Carolina Court of Appeals affirmed the Trial Court's Order without dissent on December 15, 1998. It declined to address the omission of notice on the ground that this issue had not been raised before the Trial Court and was thus not properly preserved for appellate review. It found that waiver of the Petitioner's presence at hearing by counsel did not offend due process primarily on the ground that the constitutionality of such waivers had been specifically affirmed by a Federal District Court. *French v. Blackburn*, 428 F. Supp. 1351 (M.D. N.C. 1977). It declined to address the waiver of the Petitioner's right to confront the evidence and cross-examine witnesses, again on the ground that the issue was not

preserved for review in not having been raised before the Trial Court. It also noted that the Petitioner was acting by and through his appointed counsel at the commitment hearing based on its findings that waiver of presence by counsel did not offend due process. Finally, it declined to address the Petitioner's assertion that his motion for relief had been timely filed on the ground that, in the absence of any infringement of due process by the Trial Court, this issue was moot. App. 7-14.

The Petitioner thereafter timely filed notice of an Appeal of Right based on an asserted substantial constitutional question with the Supreme Court of North Carolina on January 19, 1999. On March 10, 1999, that court dismissed the appeal upon motion by the State. It did not comment on the ruling and denied filing of arguments by the Petitioner. App. 3-5.

The Petitioner thereafter filed a Petition for Writ of Certiorari with the Supreme Court of North Carolina on March 26, 1999. Certiorari was denied without comment on July 22, 1999. App. 1.

This Petition for Certiorari is timely filed seeking review of the decision of the Supreme Court of North Carolina.

REASONS FOR GRANTING THE WRIT

I. Written notice to the respondent in a commitment proceeding cannot be waived by the appearance of a court appointed attorney

First, strictly as a matter of law, the Petitioner's objection to the trial Court's failure to give statutory notice is properly preserved for review by this Court despite the delay and not having been made before the Trial Court.

Statutory notice is no minor technicality. It establishes personal jurisdiction and thus goes to the very power of the court to hear the case. It is therefore no surprise that North Carolina Rule 60(b)(4) of Civil Procedure mandates, without time constraints, that any judgment or order which was rendered without an essential element such as service of process is void. *Williams v. Whitley*, 72 N.C. App. 155, 323 S.E. 2d 458 (1984). In addition, North Carolina has openly modeled its Rule 60 of Civil Procedure after Federal Rule 60 and hence looks to federal case law for precedent. App. 26. Federal courts have left little doubt with respect to the preservation of this objection:

> In action removed from state to federal court, fact that no motion had been made under Rule 60(b)(4) to vacate state court judgment does *not* bar federal district court's determination of the issue. *Colonial Bank & Trust Co. v. Cahill*, (N.D. Ill. 1976), 424 F. Supp. 1200. (*emphasis added*).
>
> Arguably, a motion under 60(b)(4) is subject to a "reasonable time" limitation. However, if a judgment is void it is a nullity from the outset and therefore *any* motion filed under 60(b)(4) is therefore filed within a reasonable time. *Howes*

v. Childers (E.D. Ky. 1977), 426 F. Supp. 358. (emphasis added).

The only question in the case at bar is whether or not the appearance of a court appointed attorney constitutes a valid waiver of the constitutional right of notice. Again, a Federal District Court could not have been more definite as to this specific point: "In a proceeding for the adjudication of insanity, statutory notice to the alleged insane person *is jurisdictional, and is not waived* by the appearance of an attorney appointed by the court." *Shields v. Shields*, 26 F. Supp. 211 (W.D. Mol. 1939). (emphasis added).

Any omission this egregious by a court of law arouses curiosity if nothing else. What the Petitioner uncovered upon inquiry into the specifics of why the Trial Court omitted statutory notice was deeply disturbing and should be of high priority to this Court. *Upon information and belief, no trial court in North Carolina currently serves respondents in commitment proceedings with written notice, even though it is required by N.C. Gen. Stat. 122C-264(c).* Further investigation by the Petitioner revealed that service of process was routinely done until some time in the early 1980's. Thereafter, trial courts throughout North Carolina began unilaterally waiving it, apparently with no discernible mandate from any appellate court or authorization from the legislature. Reportedly, hospital psychiatrists prevailed upon court personnel to discontinue service of process because they felt the appearance of uniformed law officers in mental wards was disturbing the patients. Interview with Connie L. Clements, Deputy Clerk of Orange County Superior Court, in Hillsborough, N.C. (Jan. 21, 1998). Whether the

alternative of plain clothes process servers was considered, or whether it even entered anyone's mind that wholesale violations of patients' constitutional rights would be created, is completely unknown.

Whatever the reasons for its adoption were, the potential for abuses arising from uninformed, misinformed, or misled waivers as a result of this policy is staggering. Current statistics show that roughly 12,000 mental patients each year are routinely deprived of their constitutional right of notice without their knowledge. Lee Weisbecher, *What Went Wrong?*, Chapel Hill News, November 26, 1995, at A11.

The issue is larger still. It raises questions as to notice in commitment proceedings nationally. This Court established minimum standards for the fulfillment of constitutional notice in a commitment proceedings in *In Re: Gault et al.*, 387 U.S. 1 (1976). The standard is that notice be *written*, that it specify the time and place of hearing, that it inform the respondent of the nature of the proceeding, and that it be given sufficiently in advance of hearing in order to allow the respondent to prepare.

A survey of commitment statutes by individual states was made by the Petitioner in order to determine whether or not and how well that standard was being implemented nationally. App 30. Results varied widely. The notice requirements of statutes for fully twenty-three states have stricter requirements than those which were established in *Gault*, 387 U.S. 1.

The statutes of eleven other states are in exact conformity with *Gault* notice requirements. Statutes of another nine states are somewhat unclear, mentioning only

"notice" without specifying whether oral or written. However, that a given state statute does not explicitly require or even mention *Gault* standard does not in and of itself mean that such state is not enforcing the standard in actual practice. N.C. Gen. Stat. § 122C-264(c) *does* explicitly require the *Gault* standard however, and in light of the Petitioner's discovery that trial courts throughout North Carolina are ignoring it, this lack of clarity in statutes of some states is anything but reassuring.

It is even more disturbing that there are some states whose statutes are deficient of the *Gault* standard on their face. Two states (Maine and Maryland) require only notice that a commitment proceeding has commenced with no mention of hearing. One state (Washington) requires only that the respondent be served with the order for his arrest. Another (Virginia) explicitly requires only *oral* notice as to the nature of the proceeding.

The reasons for discretionary review by this Court go even beyond the constitutional issues arising out of the refusal of North Carolina's court system to abide by their own statutes and the deficient federal constitutional notice requirements of several other states. *The most compelling motivation of all is that the Gault standard is itself deficient on its face because it is unconstitutionally vague.*

If an individual has his liberty curtailed for *any* length of time by being placed under arrest, whether it comes to a hearing or not, is not enough to inform him merely of *nature* of the reasons for what is being done to him. He has a constitutional right to know *exactly* what

allegations are being made about him as well as *who* is making them.

Nonetheless, statutes like N.C. Gen. Stat. § 122C-53(c) which allow medical facilities and personnel to withhold a patient's own medical records, allegedly for his or her own best interest, are currently in place in forty-two states despite overwhelming public sentiment against them. Diann Johnson and Sidney M. Wolfe, M.D., *Medical Records, Getting Yours*, page 38ff (Public Citizen's Health Research Group, July 1995.) If these statutes operate to compromise due process on a national scale then a ruling by this Court on their constitutionality in the specific context of a commitment proceeding is in order.

Lastly, it is clear that a federal requirement of serving a respondent in a commitment proceeding with both copies of the petition which affected his or her detention and the medical certificate(s) which cause the court to calendar a hearing can be implemented with existing resources without unduly burdening the courts. Commendably, this is already law in ten states: Arizona, Colorado, Georgia, Idaho, Illinois, New Hampshire, New Jersey, Oklahoma, Rhode Island, and Vermont. App. 31.

II. A respondent's presence at hearing in a commitment proceeding cannot be waived without showing of cause and subsequent determination of fact by the trial court

The respondent in a commitment proceeding suffers more than a loss of liberty. He is branded with a stigma that lasts long after his release. *In Re Taylor*, 215 S.E. 2d 789 (N.C. 1975). For the rest of his life he is viewed in the

eyes of the law much as a convicted felon. No one should have such a judgment entered against them without first being brought before a court of law, being told the effective charges and being given the opportunity to answer for them.

But common sense notions of fundamental fairness conflict with existing case law: waiver of a respondent's presence at hearing in commitment proceedings has been specifically addressed and found not to offend due process. *French v. Blackburn*, 428 F. Supp. 1351. Additionally, that ruling was affirmed on appeal by this Court. *French v. Blackburn*, 428 F. Supp. 1351 (M.D. N.C. 1977), *aff'd*, 443 U.S. 901 (1978). However, it is hard to decipher what this Court's opinion was on this specific point. Waiver of presence at hearing by counsel was only one of several issues raised in *French*, and this Court affirmed without comment.

This Court should exercise its authority for discretionary review here for three reasons. The first is precedent. This Court's affirmation of waiver of a respondent's presence at hearing with no showing of cause conflicts, at least in concept and direction, with a veritable raft of its earlier decisions. The second is constitutional principle. Such a waiver is wrong by any sound line of legal reasoning. The third is the numbers involved. Roughly 12,000 individuals are affected each year in North Carolina and potentially several times that nationally. Lee Weisbecher, *What Went Wrong?*, Chapel Hill News, November 26, 1995, at A11.

Previous conflicting rulings of this Court involve both criminal and civil cases. It is well established that

because of the loss of liberty involved, a respondent in a commitment proceeding is entitled to the same constitutional safeguards as a defendant in a criminal proceeding. *O'Connor v. Donaldson*, 422 U.S. 563 (1975). No criminal court in the land would tolerate the entry of a guilty plea in a defendant's absence and nothing to indicate that the plea was a knowing and voluntary act done with full understanding of the consequences. A signed waiver is required even for as little as a speeding ticket. This Court has long and repeatedly stressed that trial courts be certain that waivers of constitutional rights on criminal proceedings be knowing acts done with full awareness on the part of the defendant as to the likely consequences. See *Machibroda v. United States*, 368 U.S. 487, 493 (1962), *Waley v. Johnson*, 316 U.S. 101, 104 (1942), *Walker v. Josston*, 312 U.S. 275, 286 (1941), *Chambers v. Florida*, 309 U.S. 227 (1940), *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

Most directly relevant to the instant case, this Court remanded two cases where the trail court did not explain the consequences of a guilty plea clearly, even though the defendant was present before the court and was represented by an attorney. One case involved an individual who pleaded guilty to the criminal charge of income tax evasion under the mistaken impression that he was only admitting that he owed money, *McCarthy v. United States*, 394 U.S. 459 (1969). The other involved an individual of German ethnicity who entered a guilty plea to a charge of conspiracy for alleged espionage activities during the Second World War. *Von Moltke v. Gilies*, 332 U.S. 708 (1947).

Yet, in a commitment proceeding in North Carolina, there is no requirement for the trial court to make any first hand inquiry whatsoever of a respondent to ensure that his waiver of a contested hearing is an act of informed consent. There should be. It was as recent as 1975 before this Court established dangerousness in addition to mental illness as a requirement for civil commitment, *O'Connor v. Donaldson*, 422 U.S. 563 (1975). *Therefore no layman, however intelligent and well informed he may be, can reasonably be presumed to know the legal implications of being involuntarily committed without clear explanation by the trial court.* But again this necessitates the presence of the respondent before the trial court at some point in the proceeding. There are surely instances where the respondent does not wish to appear in court, but at the very least a signed waiver should be required.

This Court has spoken less often in the context of civil commitment than with the criminal analogue. However, it did find that civil commitment statutes with no provision for hearing were unconstitutional. *Sprecht v. Patterson*, 386 U.S. 605 (1967). This ruling may not conflict with *French*, per se, but it is certainly at odds with *French*, in direction and concept. If the respondent's presence at hearing together with his right to contest the evidence can be waived without his knowledge or consent by a third party then the practical point of *Sprecht* is destroyed.

French, is however in open conflict with at least three federal district court cases with respect to waiver of a respondent's presence at hearing. See *Bell v. Wayne County General Hospital*, 384 F. Supp. 1085 (E.D. Mich.

1974), *Doremus v. Farrell*, 407 F. Supp. 509 (D. Neb. 1975), *Lynch v. Baxley*, 386 F. Supp. 378 (M.D. Ala. 1974).

The second reason which justifies review by this Court is that such a waiver is wrong on fundamental principles. This can be demonstrated by close examination of the following:

> In light of the very nature of the lawyer-client relationship and in light of the ethical obligation of the lawyer to act for his client's best interests, we cannot adopt the premise that a lawyer would waive his client's presence other than when it would be to the client's own benefit due to his mental condition or some other valid reason. Nor can we assume a court would consent to such a waiver without some legitimate reason being presented to it. To assume otherwise would be to suggest that the court and the advocate somehow conspire to deprive the respondent of his constitutional rights in violation of the very ethics and responsibilities of their very positions. *French*, 428 F. Supp. at 1357.

This opinion is beautifully articulated but in fact contains some of the most specious legal reasoning ever penned. First *an attorney's ethical obligation in any proceeding is not to act in what he feels is in his client's best interest. It is to act in a direction that is in concert with his client's wish and he is in fact in violation of the ethical obligations of the lawyer client relationship if he does not.*

The commitment statutes of one state (Texas) even contain an explicit warning to attorneys on this point:

> The attorney may advise the patient of the wisdom of agreeing or resisting efforts to provide mental health services, but the proposed patient

> shall make the decision to agree or resist the efforts. Regardless of an attorney's personal opinion, the attorney shall use all reasonable efforts within the bounds of the law to advocate the patient's right to avoid court-ordered mental health services if the proposed patient expresses a desire to avoid the services. TEXAS HEALTH & SAFETY ANN. § 574.004(c) (West 1992).

However, it is quite common in a commitment proceeding for a patient's attorney to act contrary to his client's wish. This fundamental deficiency was perhaps best described by one of the federal district courts which conflicts with *French*:

> Counsel's representation of the prospective patient may be inadequate since in these circumstances he usually sees his role not as a defense counsel but as a traditional guardian who determines for himself what is in the best interests of his ward and proceeds on that basis, virtually disregarding the latter's will. *Bell*, 384 F. Supp. at 1094.

At some point an individual's attorney must be trusted to do his job as he best sees fit, but again he must at the very least act towards a goal that is in concert with his client's wish. Furthermore, that he does so is too critical to rely on *assumption*.

The most compelling argument of all against waiver of appearance comes from analogous application of the principle that a defendant is innocent until proven guilty in a criminal proceeding. *O'Connor*, 422 U.S. 563. It may be necessary, and is thus altogether reasonable, to confine individuals under petition for involuntary commitment prior to hearing. In addition, it is reasonable to allow the

psychiatrists responsible for their treatment to take such action as they deem appropriate. But a patient must be treated *in the eyes of the law* as though he is fully capable of making informed decisions on his own behalf just as any other citizen until the court makes findings of fact and enters a judgment that he is mentally ill. Waiver of a respondent's presence at hearing by counsel, without showing of cause or indication of his consent, implicitly presumes the respondent is in some way mentally impaired by empowering someone else to make such a critical decision for him without his consent prior to judgment. This is very wrong.

Lastly, from the standpoint of the numbers, it is impossible to ascertain just how many respondents have their presence at hearing so waived, or how many cases are materially affected by such waivers. But, as with omission of notice, the potential for abuses is staggering. Again, some 12,500 cases each year in North Carolina are potentially involved with numbers several times that in other states. Lee Weisbecher, *What Went Wrong?*, Chapel Hill News, November 26, 1995, at A11.

As with notice, a survey of commitment statutes was made by the Petitioner in order to determine the circumstances under which waiver of a respondent's presence at hearing is allowed nationally by individual states. App. 35. Results again vary widely. For the majority, they are reassuring. The statutes of fourteen states explicitly prohibit waiver of a respondent's right to be present at hearing by anyone other than the respondent. Further, these states additionally provide well defined procedures as to how waiver can be affected if the respondent desires. The respondent's presence at hearing is even

more than a right in three states (Nevada, Oregon, and West Virginia): It is *a requirement*. Another nine states prohibit waiver of presence by anyone but the respondent, but are unclear as to the specifics of how it is put into effect. The point is that the statutes of fully twenty-six states explicitly conflict with the opinion of *French*.

There is also what might be termed a middle or undecided group. Statutes of another ten states are completely ambiguous in that they mention neither the respondent's right to be present at hearing, or any waiver thereof.

Then come the states which are clearly less protective of a respondent's right to be present at hearing. Eight states allow waiver of presence by counsel, but require some showing of cause.

Lastly there are those states whose statutes are clearly deficient with regard to protection of a respondent's right to be present at hearing. Six states to Alabama, Illinois, Iowa, North Carolina, Oklahoma, and Washington, have statutes which explicitly allow the respondent's counsel to exclude his client from hearing in advance by the filing of a written statement with the court.

Lastly, there is one state whose statutes, it would seem, are unconstitutional on their face: Michigan allows comitting psychiatrists to exclude the respondent from the hearing if in their opinion "the subject's attendance would expose him or her to serious risk of physical harm."

The point here is *French* is not a high standard relative to the rest of the nation. The statutes of only seven states are equally or less of a respondent's right to be present at hearing than *French*.

CONCLUSION

The due process rights of mental patients have received far less attention by this Court than the due process rights defendants in criminal proceedings. This is evident from the great landmark decisions of this Court on mental health commitment coming as late as they did. The right to written notice prior to hearing was established in 1967. *Gault*. The right to hearing (at least in statute) also was established in 1967. *Sprecht*. A uniform national standard for commitment itself was not established until 1975. *O'Connor*.

As an individual injustice, the case at bar graphically demonstrates that the due process rights of notice and the opportunity to be heard are reduced to a sham if they exist only in the cold statutes and the accused does not know what they are and no one will tell him. Yet, notice and the opportunity to be heard are the very *definition* of due process. If they are to have the legal force that the founding fathers intended, they must be implemented by well defined formal procedures between the court and the accused in the first person. Finally and most importantly, those procedures must themselves be explicitly specified by statute.

The value of the case at bar to this Court is that it presents an opportunity to readdress and set effective

national standards in mental health commitment proceedings for the implementation of not just one, but both vital components of due process, notice *and* the opportunity to be heard. Those standards are needed: The lack of uniformity and the deficiency shown in the surveys of individual state statutes proves this. App. 30, *et seq.* And, those standards are important: They ensure that perhaps the most vulnerable of this nation's citizens, the mentally ill who find themselves under petition for involuntary commitment, are afforded their right of self determination in a free society just as anyone else.

For those reasons, the Petitioner prays that this Court will upon consideration issue a Writ of Certiorari for discretionary review of the case at bar.

Respectfully submitted, this the 20th day of October, 1999.

Wm. F. Hargrove Jr.
Petitioner
Pro Se
A2 Graham Court
233 McAllen Street
Chapel Hill, NC 27516
Tel: (919) 929-0834

No. 145P99 FIFTEEN-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

(In Matter of: William F. Hargrove Jr.)

IN THE MATTER OF: WILLIAM F. HARGROVE JR.

From NC Court of Appeals
(COA98-293)
From Orange
(94SPC786)

ORDER

Upon consideration of the petition filed by Respondent in this matter for a writ of certiorari to review the decision of the North Carolina Court of Appeals, the following order was entered and is hereby certified to the North Carolina Court of Appeals:

"Denied by order of the Court in conference, this the 22nd day of July 1999.

Justice Martin recused.

s/ Wainwright, J.
For the Court"

WITNESS my hand and the seal of the Supreme Court of North Carolina, this the 26th day of July 1999.

/s/ Christie Speir Cameron
Christie Speir Cameron
Clerk, Supreme Court of
North Carolina

[SEAL]

Copy to:
North Carolina Court of Appeals
Mr. William F. Hargrove, Jr.
Ms. Jane L. Oliver, Assistant Attorney General, For State
Mr. Ralph A. White, Appellate Court Reporter
West Publishing Company
Lexis-Nexis

[SEAL]
SUPREME COURT OF NORTH CAROLINA
CHRISTIE SPEIR CAMERON, Clerk
Justice Building, 2 E. Morgan Street
Raleigh, N C 27601
(919) 733-3723

Fax: (919) 733-0105
Web: www.aoc.state.nc.us

Mailing Address:
P.O. Box 2170
Raleigh, NC 27602

10 March 1999

Ms. Jane L. Oliver
Assistant Attorney General
Legal Dept.,
6001 East Wing
UNC Hospitals
101 Manning Drive
Chapel Hill, NC 27514

From NC Court
of Appeals
(COA98-293)
From Orange
(94SPC786)

Re: In the Matter of: W. Hargrove
No. 18A99

Dear Ms. Oliver:

Attorney General's Motion to Dismiss Appeal has been filed and the following order entered:

"Motion Allowed by order of the Court in conference this the 3rd day of March 1999.

s/ Wainwright, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

/s/ Carol B. Templeton
Carol B. Templeton
Assistant Clerk

Copy to:
Mr. Ralph A. White, Appellate Court Reporter
West Publishing
Lexis-Nexis
Mr. William F. Hargrove, Jr., For Pro se

[SEAL]
SUPREME COURT OF NORTH CAROLINA
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Raleigh, NC 27602

10 March 1999

Mr. William F. Hargrove, Jr.
A2 Graham Court
233 McCauley Street
Chapel Hill, NC 27516

From NC Court
of Appeals
(COA98-293)
From Orange
(94SPC786)

Re: In the Matter of: W. Hargrove
No. 18A99

Dear Mr. Hargrove:

Motion by Respondent to Allow the Filing of Arguments in Opposition to the State's Response has been filed and the following order entered:

"Motion Denied by order of the Court in conference this the 3rd day of March 1999.

s/ Wainwright, J.
For the Court"

Very truly yours,

Christie Speir Cameron
Clerk of Supreme Court

/s/ Carol B. Templeton
Carol B. Templeton
Assistant Clerk

Copy to:
Mr. Ralph A. White, Appellate Court Reporter
West Publishing
Lexis-Nexis
Ms. Jane L. Oliver, Assistant Attorney General, For State

NO. COA98-293

NORTH CAROLINA COURT OF APPEALS

Filed: 15 December 1998

IN THE MATTER OF:

WILLIAM FOSTER HARGROVE

Orange County
No. 94-SPC-786

Appeal by respondent from order entered 15 January 1998 by Judge Stanley Peele in Orange County District Court. Heard in the Court of Appeals 26 October 1998.

Attorney General Michael F. Easley, by Assistant Attorney General Jane L. Oliver, for the State.

William F. Hargrove, Jr., respondent-appellant, pro se.

TIMMONS-GOODSON, Judge.

Respondent William Foster Hargrove, Jr. appeals from an order denying his motion for appropriate relief from a judgment of involuntary commitment. Respondent contends that this ruling was error, because he was denied due process with respect to the commitment proceedings. Upon review of respondent's assignments of error, we affirm the order of the trial court.

On 27 December 1994, Deputy Charles S. Blackwood of the Orange County Sheriff's Department filed an affidavit and petition for involuntary commitment of respondent. In the affidavit, Deputy Blackwood stated that respondent went to the Chapel Hill Police Department and the Orange County Sheriff's Department and claimed to have a letter bomb in his possession. Deputy Blackwood also stated in the petition that respondent was highly agitated and that he posed a threat to the public as well as himself.

Based on Deputy Blackwood's petition and affidavit, an assistant clerk of the Orange County Superior Court found probable cause to believe that respondent was mentally ill and dangerous to himself and/or others. The assistant clerk issued a custody order, and respondent was taken into custody on 27 December 1994 and transported to the University of North Carolina Hospitals for examination. Dr. Hughes, the first physician to examine respondent, reported that respondent had been brought to the hospital after threatening to blow up the sheriff's department and that he was clearly psychotic and possibly manic. On the basis of these findings, Dr. Hughes determined that respondent was mentally ill and dangerous to himself and others. Dr. Hughes recommended that respondent be held for involuntary inpatient commitment.

On 28 December 1994, a second physician, Dr. Susan Meland, examined respondent and diagnosed him as being in a manic state of bipolar disorder. Dr. Meland recorded as fact that respondent threatened to bomb a building and rape hospital staff. Based on these findings, Dr. Meland, likewise, determined that respondent was mentally ill and a danger to himself and others. Dr. Meland also recommended inpatient commitment.

The Orange County District Court appointed Karen Murphy on 3 January 1995 to act as respondent's attorney at the commitment hearing scheduled for 6 January 1995. Murphy waived respondent's right to appear at the proceeding, and respondent was not present. At the hearing, the State's evidence consisted of a written report regarding respondent's condition, dated 4 January 1995. The report was prepared by Dr. Meland and contained the

following information: a pertinent history, a description of respondent's symptoms and behavior during his admission, a statement of respondent's diagnoses, an opinion that respondent was a danger to others and the basis of that opinion, a statement of the specific goals of treatment, and a recommendation to the court concerning the time needed for respondent's treatment. Specifically, Dr. Meland reported that respondent was admitted in an acute manic state of bipolar disorder. She stated that respondent had "a one to two year history of increased active preoccupation with guns and ammunition as well as poor sleep." Dr. Meland described respondent as "hostile, paranoid and agitated" during the admission. She stated that respondent had threatened to jump out of a window, blow up a building, and physically and sexually assault staff during the admission. Finally, Dr. Meland recommended that the court commit respondent for inpatient treatment for a period of up to 15 days so that he could be stabilized on medications before his discharge. Dr. Meland also recommended that respondent be placed under outpatient commitment following his release from the hospital.

The trial court found as fact all of the matters set out in Dr. Meland's written report and concluded that respondent was mentally ill and dangerous to others. The court ordered that respondent be committed for a period not to exceed 15 days and that he be placed under outpatient commitment for a period of up to 75 days. On 10 November 1997, respondent filed a motion for appropriate relief. The trial court denied the motion, and respondent appeals.

Respondent's first argument on appeal is that the trial court denied his right to due process under the Fourteenth Amendment to the United States Constitution by failing to give him statutory notice of the commitment proceedings. The record reveals, however, that respondent failed to bring this matter to the attention of the trial court; therefore, this issue has not been properly preserved for our review. As this Court has stated,

> Rule 10(b)(1) of the North Carolina Rules of Appellate Procedure requires that a party present the trial court with a timely request, objection, or motion, in order to preserve a question for appellate review. If the party fails to appropriately preserve his question for appellate review, he is said to have waived his right to appellate review of that question.

Heib v. Lowery, 121 N.C. App. 33, 39, 464 S.E.2d 308, 312, *aff'd*. 344 N.C. 403, 474 S.E.2d 323 (1995). Likewise, an appellate court will not consider a constitutional issue, "unless it affirmatively appears that the party urging the claim raised it at trial and the trial court ruled upon it." *Adams Outdoor Advertising v. N.C. Dept. of Transportation*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). Thus, since respondent has waived his right to appeal the issue concerning lack of notice, we decline to address this matter and proceed to respondent's remaining arguments.

Next, respondent contends that the trial court, by permitting respondent's counsel to waive his appearance, violated his constitutional right to procedural due process. Section 122C-268(e) of the North Carolina General

Statutes states that "[w]ith the consent of the court, counsel may in writing waive the presence of the respondent." N.C. Gen. Stat. § 122C-268(e) (1996). The issue of whether due process is infringed by North Carolina's statute allowing a respondent's attorney to waive her client's appearance at a civil commitment proceeding was decided in *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977). In *French*, the United States District Court for the Middle District of North Carolina considered the constitutionality of section 122-58.7(d), the precursor to section 122C-68(e) of our General Statutes. The *French* court held that section 122-58.7(d), which contained language identical to that of section 122C-268(e), did not violate the requirements of due process. The court articulated the following reasons for its decision:

> In light of the very nature of the lawyer-client relationship and in light of the ethical obligation of the lawyer to act for his client's best interests, we cannot adopt the premise that a lawyer would waive his client's presence other than when it would be to the client's own benefit due to his mental or physical condition or for some other valid reason. Nor can we assume that a court would consent to such a waiver without some legitimate reason being presented to it. To assume otherwise would be to suggest that the court and the advocate somehow conspire to deprive the respondent of his constitutional rights in violation of the very ethics and responsibilities of their respective positions.

Id. at 1357-58.

Furthermore, it is axiomatic that a statute enacted by the General Assembly is presumed to be constitutional,

and every presumption is to be indulged in favor of validity. *Wayne County Citizens Assn. v. Wayne County Bd. of Comrs.*, 328 N.C. 24, 399 S.E.2d 311 (1991). "A statute will not be declared unconstitutional unless its unconstitutionality is so clear that no reasonable doubt can arise, or the statute cannot be upheld on any reasonable ground." *City of Concord v. All Owners of Taxable Property*, 330 N.C. 429, 432, 410 S.E.2d 482, 483 (1991). The party challenging the statute bears the burden of showing that the statute is unconstitutional. *Mobile Home Sales v. Tomlinson*, 276 N.C. 661, 669, 174 S.E.2d 542, 548 (1970). In light of the foregoing, we conclude that respondent has not carried his burden of establishing the unlawfulness of the statute, and we find no error in the court's decision allowing respondent's counsel to waive his appearance under section 122C-268(e) of the General Statutes.

By his next argument, respondent contends that the trial court's findings of fact in the commitment order are erroneous, because the court denied respondent an opportunity to cross-examine the witnesses against him and to present evidence in his defense. This argument is grounded in respondent's preceding contentions that the trial court denied his right to procedural due process. In light of our holding as to the preceding claims, we need not address the due process components of the present argument. Moreover, since respondent, through his counsel, explicitly waived his right to contest the State's evidence, this argument is not properly preserved for our review. *See Heib*, 121 N.C. App. 33, 464 S.E.2d 308 (stating that failure to preserve issue for appellate review results in waiver).

Lastly, respondent contends that the trial court erred in denying his motion for appropriate relief, filed 10 November 1997, wherein he requested a rehearing to determine whether sufficient grounds existed to support the judgment of involuntary commitment. Once again, respondent bases this argument on the due process issues previously raised. However, having found no infringement on respondent's right to procedural due process, we summarily reject this contention.

Respondent argues further that the operation of section 122C-53(c) of the General Statutes, which restricts access to a respondent's medical records and civil commitment file, prevented him from obtaining the information necessary to preserve his rights to seek this Court's review of the commitment order within 30 days after its entry. *See* N.C.R. App. P. 3(c) (requiring that appeal from judgment rendered in civil or special proceeding be taken within 30 days after it was entered); N.C. Gen. Stat. § 122C-53(c) (1996). Respondent contends that for this reason, his motion for appropriate relief should have been allowed.

Rule 60(b) of the North Carolina Rules of Civil Procedure provides that the trial court may, "on motion and upon such terms as are just, . . . relieve a party or his legal representative from a final judgment, order, or proceeding for . . . excusable neglect." N.C.R. Civ. P. 60(b). The rule further provides, however, that a motion must be made within a reasonable time, and where the basis of the motion is excuseable neglect, the motion must be made within one year after the judgment was entered. *Id.* Whether to grant a motion for appropriate relief under Rule 60(b) is a matter committed to the sound discretion

of the trial court, and the court's decision in this regard will not be disturbed absent an abuse of that discretion. *Sawyer v. Goodman*, 63 N.C. App. 191, 303 S.E.2d 632 (1983).

The record reveals that the order of involuntary commitment was entered 6 January 1995, and although he was represented by counsel, respondent failed to appeal from the order within 30 days after its entry. Respondent's argument that he was unable to obtain his medical records and civil commitment file appear to assert "excusable neglect" as the ground for his motion under Rule 60(b). However, the rule specifically provides that a motion for appropriate relief based on excusable neglect must be made within one year after the relevant judgment was made. N.C.R. Civ. P. 60(b). Because respondent's motion was filed 10 November 1997, nearly three years after the civil commitment order was entered, we can find no abuse of discretion in the trial court's decision denying respondent's motion for appropriate relief.

Based upon the foregoing, the order of the trial court denying respondent's motion for appropriate relief is affirmed.

Affirmed.

Chief Judge EAGLES and Judge SMITH concur.

Report per Rule 30(e).

IN THE GENERAL COURT OF JUSTICE
DISTRICT COURT
FILE NO. 94 SPC 786

STATE OF NORTH CAROLINA

ORANGE COUNTY

IN THE MATTER OF:	)	
	)	ORDER
WILLIAM FOSTER HARGROVE	)	

THIS MATTER coming before the Court, at the December 12, 1997 Session for Special Proceedings in the Orange County District Court, upon a Motion for appropriate Relief filed by Respondent, *pro se*, pursuant to N.C.G.S. 15A-1420(c)(1), the Court, having heard arguments of the parties, finds as follows:

1. Chapter 122C of the North Carolina General Statutes does not provide jurisdiction for the District Court to rehear this matter as requested by Respondent in his Motion;

2. The judgment of the District Court in ordering inpatient commitment of Respondent on January 6, 1995 may be corrected only by appeal and the time for filing appeal has expired;

3. The undersigned District Court Judge cannot modify the judgment of another District Court Judge by way of Respondent's Motion for Appropriate Relief; and

4. In *French v. Blackburn*, 428 F.Supp. 1351, (M.D. N.C. 1977), the U.S. District Court held that a waiver of

the presence of a respondent at an involuntary commitment hearing by the respondent's attorney does not violate the Due Process Clause of the Constitution.

Whereupon, for the reasons stated above, Respondent's Motion for Appropriate Relief is denied.

This the 12 day of December, 1997.

[Signed 1/12/98]

/s/ Stanley Peele
Judge Stanley Peele
District Court Judge

STATE OF NORTH CAROLINA — File No. 94/786

ORANGE County — In The General Court Of Justice
District Court Division

IN THE MATTER OF:
Respondent
/s/ William Hargrove

ORDER
INVOLUNTARY
COMMITMENT
PROCEEDINGS
MENTALLY ILL OR
MENTALLY
RETARDED

G.S. 122C-267, -268, -271

FINDINGS

The Court finds that:

The petitioner [X] was ___ represented by counsel.

[ ] was not

The respondent [X] was ___ represented by counsel, Illegible

Respondent [X] was not present.

Based on the evidence presented, the Court

[X] by clear, cogent and convincing evidence finds as facts all matters set out in the physician's/eligible psychologist's report, specified below, and the report is incorporated by reference as findings.

Date Of Last Examiner's Report	*Name Of Physician/Eligible Psychologist*
January 4, 1995	/s/ Susan Meland, M.D.

[ ] by clear, cogent and convincing evidence finds these other facts:

[ ] finds that the respondent does not meet the criteria for commitment.

[ ] finds that this proceeding was begun after the respondent was charged with a violent crime and was found not guilty by reason of insanity or incapable of proceeding.

CONCLUSIONS

Based on the above findings, the Court concludes that the respondent:

[X] is [X] mentally ill [ ] mentally retarded with an accompanying behavior disorder

[ ] is not mentally ill, or mentally retarded with an accompanying behavior disorder.

[X] is dangerous to [ ] himself. [X] others.

[ ] is not dangerous to himself or others.

[~~X~~] illegible initials *(only for nondangerous mentally ill)* is capable of surviving safely in the community with available supervision from family, friends or others; and based on respondent's treatment history, he is in need of treatment in order to prevent further disability and deterioration which would predictably result in dangerousness to himself or others. And, that the respondent's

inability to make an informed decision to voluntarily seek and comply with recommended treatment is caused by:

[X] his current mental status.

[X] the nature of his mental illness.

(NOTE: *Use AOC-SP-304 for involuntary commitment of defendant found incapable to proceed and AOC-SP-911M for involuntary commitment of defendant found not guilty by reason of insanity.)*

AOC-SP-203. Rev. 9/91 See ORDER on reverse

ORDER

---

it is ORDERED that:

[ ] the respondent be committed/recommitted to the inpatient 24-hour facility named below for the period specified.

[ ] the respondent be committed/recommitted to outpatient commitment under the supervision and management of the center/physician named below for the period specified.

[ ] the respondent may be held at the 24-hour facility where he is now being held, for up to 72 hours in order for the facility to notify the designated outpatient center of respondent's treatment needs.

[X] the respondent be committed/recommitted to an inpatient 24-hour facility named below not to exceed the specified period. Following discharge from the 24-hour facility, the respondent shall be committed to outpatient commitment under the supervision of

the center/physician named below for the specified period.

[ ] the respondent be discharged and this matter dismissed.

[ ] the respondent be discharged and since he was charged with a violent crime and found incapable of proceeding that he be released to the custody of the Law Enforcement Agency named below.

Law Enforcement Agency

[ ] this matter be transferred to the county named below for further proceedings.

County

INPATIENT COMMITMENT	OUTPATIENT COMMITMENT
Committed/recommitted to inpatient facility for a period not to exceed	Committed/recommitted to outpatient care for a period not to exceed
[X] 15 days. [ ] 90 days. [ ] 180 days. [ ] 1 year.	[X] 75 days. [ ] 90 days. [ ] 180 days.
Name And Address Of 24-hour Facility	*Name And Address Of Treatment Center/Physician*
UNC Hospital at Chapel Hill	Dr. Perilstein

Date
January 6, 1995

Signature Of District Court Judge
/s/ Illegible

Typed Name Of District Court Judge
/s/ Judge Lowry Butts

[LOGO] **UNIVERSITY OF NORTH CAROLINA HOSPITALS**

101 Manning Drive
Chapel Hill, North Carolina 27514

COURT STATEMENT

(Filed Jan. 11, 1995)

Re: Mr. William Hargrove

Date: January 4, 1995

HISTORY PRIOR TO ADMISSION:

The patient is a forty-five (45) year old White male with no prior psychiatric hospitalizations who was brought to the hospital by police after making two visits to the Chapel Hill Police Department on December 29, 1994 and December 25, 1994 where he was making statements about confiscated guns and drugs. He told officers to stay on their feet and gave them an envelope which he referred to as a letter bomb. Prior to this, the patient has a one to two year history of increased active preoccupation with guns and ammunition as well as poor sleep.

OBSERVATIONS SINCE ADMISSION:

On December 27, 1994 the patient was admitted due to his acute manic state. He was hostile, paranoid, and agitated. The patient threatened to physically and sexually assault staff. He threatened to jump out of a window as well as blow up the building.

TENTATIVE DIAGNOSIS:

Axis I: Bipolar Disorder, Manic

Axis II: Deferred

Axis III: History of Neurotic Dermatitis

Axis IV: Severe

Axis V: 50

DANGEROUSNESS TO SELF/OTHERS:

The patient's threatening, sometimes violent, behavior together with his unpredictable nature make him a danger to others resulting in danger/harm to himself.

TREATMENT GOALS:

Stabilize on neuroleptic and possibly a mood stabilizer as well.

RECOMMENDATIONS:

Fifteen (15) days inpatient hospitalization together with seventy-five (75) days Outpatient Commitment to Dr. Perilstein who is agreeable to accept the patient.

/s/ S. Meland, M.D.
Susan Meland, M.D.
Psychiatry Resident

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

---

§ 1A-1 NC Rules of Civil Procedure

§ 1A-1, Rule 4 RULES OF CIVIL PROCEDURE

Rule 4. Process.

* * *

(j) *Process – Manner of service to exercise personal jurisdiction.* – In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process within or without the State shall be as follows:

(1) Natural Person. – Except as provided in subsection (2) below, upon a natural person:

a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of

suitable age and discretion then residing therein; or

b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

* * *

---

§ 1A-1, Rule 60 NC RULES OF CIVIL PROCEDURE

Rule 60. Relief from judgment or order.

* * *

(b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* – On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this section does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action.

* * *

COMMENT

There is not as much difference between the federal rule and the North Carolina as first blush would indicate. Actually, the federal rule uses very succinct language to incorporate most of the results obtained under the North Carolina statutes and case law.

* * *

NC Statutes on Civil Commitment

North Carolina General Statute § 122C-53(c)

§ 122C-53. Exceptions; client.

* * *

(c) Upon request a client shall have access to confidential information in his client record except information that would be injurious to the client's physical or mental well-being as determined by the attending physician or, if their is none, by the facility director or his designee. If the attending physician or, if there is none, the facility director or his designee has refused to provide confidential information to a client, the client may request that the information be sent to a physician or psychologist of the client's choice, and in this event the information shall be so provided.

* * *

North Carolina General Statute § 122C-54(d)

§ 122C-54. Exceptions; abuse reports and court proceedings.

* * *

(d) Any individual seeking confidential information contained in the court files or the court records of a proceeding made pursuant to Article 5 of this Chapter may file a written motion in the cause setting out why the information is needed. A district court judge may issue an order to disclose the confidential information sought if

he finds the order is appropriate under the circumstances and if he finds that it is in the best interest of the individual admitted or committed or of the public to have the information disclosed.

* * *

North Carolina General Statute § 122C-264(c)

§ 122C-264. Duties of clerk of superior court and the district attorney.

* * *

(c) Notice to the respondent, required by subsections (a) and (b) of this section, shall be given as provided in G.S. 1A-1, Rule 4(j) at least 72 hours before the hearing. Notice to other individuals shall be sent at least 72 hours before the hearing by first-class mail postage prepaid to the individual's last known address. G.S. 1A-1, Rule 6 shall not apply.

* * *

North Carolina General Statute § 122C-268(d)

§ 122C-268. Inpatient commitment; district court hearing.

* * *

(d) The respondent shall be represented by counsel of his choice; or if he is indigent within the meaning of G.S. 7A-450 or refuses to retain counsel if financially able

to do so, he shall be represented by counsel appointed by the court.

* * *

North Carolina General Statute § 122C-268(e)

§ 122C-268. Inpatient commitment; district court hearing.

* * *

(e) With the consent of the court, counsel may in writing waive the presence of the respondent.

* * *

North Carolina General Statute § 122C-268(f)

§ 122C-268

* * *

(f) Certified copies of reports and findings of physicians and psychologists and previous and current medical records are admissible in evidence, but the respondent's right to confront and cross-examine witnesses may not be denied.

* * *

STATUTORY REQUIREMENTS OF NOTICE TO RESPONDENT IN MENTAL HEALTH COMMITMENT PROCEEDINGS LISTED BY INDIVIDUAL STATE

Although commitment statutes vary widely from state to state, all states require the filing with the court of a document stating some justification as to why the respondent should be taken into custody. This document is referred to by different terms in different states, but hereinafter it is referred to as the "Petition". In some states only a law officer or health care professional can file a Petition, in other states a relative of the respondent may file, and in still other states any interested person may file a Petition. But in all states its function is the same: the Petition alerts the court that there is an individual who may need to be committed and in as such it is the filing which initiates the proceeding.

Commitment proceedings of all states also require a report as to the respondent's medical condition. The specifics vary widely, i.e. whether a psychiatrist, physician, mental health nurse, head of a health care facility is qualified, whether one or multiple reports must be filed, etc., but no state will set a hearing without at least one report of a licensed professional which states that in their clinical opinion, the respondent is mentally ill and dangerous to him/her self and/or to others. Hereinafter it is referred to as the "Certificate" and the professional who writes that report is referred to as the "Examiner".

Unless otherwise commented, "Notice" means a written statement of the time, date, and location of hearing and an indication as to the nature of the proceeding.

The groups of statutes are listed in order of how protective they are of the respondent's rights, with the most protective appearing first and the least protective appearing last. Individual statutes are listed alphabetically within group.

10 statutes require the respondent to be served with Notice, Petition, and Certificate(s):

ARIZ. REV. STAT. § 36-536(A) (1999)
COLO. REV. STAT. ANN. § 27-10-107(3), 27-10-109(c)(2) (West 1999)
GA. CODE ANN. § 37-3-62(a), 37-3-81(3) (1999)
IDAHO CODE § 66-329(f) (1999)
405 ILL. COMP. STAT. ANN. 5/3-705, 5/3-803 (West 1999)
N.H. REV. STAT. ANN. § 135-C:38, 135-C:41 (1998)
N.J. REV STAT. § 30:4-27.13 (1999)
OKLA. STAT. tit. 43A, § 5-412(A) (1998)
R.I. GEN. LAWS § 40.1-5-8(2)(d), 40.1-5-8(2)(e) (1999)
VT. STAT. ANN. tit. 18, § 7613(a) (1999)

1 statute requires the respondent to be served with Notice, Petition, and optionally the Certificate(s):

HAW. REV. STAT. § 334-60.3(b), 334-60.4(b)(2) (1999)

1 statute requires the respondent to be served with Notice, Petition, and name of Examiner (but NOT Certificate):

WYO. STAT. ANN. § 25-10-119(d), § 25-10-110(f) (Michie 1999)

1 statute requires the respondent to be served with Notice, Certificate(s), but NOT Petition:

N.M. STAT. ANN. § 43-1-11(A) (Michie 1978)

1 statute requires the respondent be served with Certificate(s), written notice of right to hearing by Writ of Habeas Corpus which requires respondent's signature to execute:

CAL. HEALTH AND SAFETY CODE § 5275-5278 (West 1999)

9 statutes require the respondent be served with Notice, Petition, but NOT Certificate(s):

ALA. CODE § 22-52-8-8(a) (1975)
ALASKA STAT. § 47-30-730(a) (1998)
ARK. CODE ANN. § 20-47-211 (Michie 1996)
IOWA CODE ANN. § 229.7 (West 1999)
NEB. REV. STAT. § 83-1048 (1994)
N.D. CENT. CODE § 25-03.1-09(2)(a), 25-03.1-12 (1999)
OHIO REV. CODE ANN. § 5122.12(A) (Anderson 1989)
TENN. CODE ANN. § 33-3-605 (1998)
WIS. STAT. ANN. § 51.20(2) (West 1994)

11 statutes are in exact conformity with the Re:Gault standard, requiring the respondent be served with Notice ONLY, and not Petition or Certificate(s):

DEL. CODE ANN. tit. 16, § 5006(1) (1999)
FLA. STAT. ch. 394.4599(2)(c) (1999)
IND. CODE ANN. § 12-26-6-3(a)(1), IC 12-26-6-3(b) (Michie 1999)
MISS CODE ANN. § 41-21-73(1) (1998)
NEV. REV. STAT. § 433A-220(2) (1999)
N.C. GEN. STAT. § 122C-264(c) (1998)
OR. REV. STAT. § 426-090 (1997)
S. C. CODE ANN. § 44-17-420 (Law. Co-op. 1999)
TEXAS HEALTH & SAFETY CODE ANN. § 571.013 (West 1992)

UTAH CODE ANN. § 62A-12-234(4) (1999)
W. VA. CODE § 27-5-4(e)(1) (1999)

8 statutes require only that the respondent be served with "notice" without specifying whether it be written or oral.

CONN. GEN. STAT. § 17a-498(a) (1999)
KAN. STAT. ANN. § 59-2959(b) (1999)
KY. REV. STAT. § 202A.051(b) (Banks-Baldwin 1999)
LA. REV. STAT. ANN, § 28:54(c) (West 1999)
MASS. GEN. LAWS ch. 123 § 7(c) (1999)
MICH. COMP. LAWS § 330.1453(1), 330.1432(a), 330.1431(2) (1998)
MO. ANN. STAT. § 632.335(1) (West 1999)
MONT. CODE ANN. § 53-21-115(1) (1999)
1999 Pa. Legis. Serv. 4406(3)(iii) (West)

1 statute requires that the respondent be notified only of the time and date of hearing, with no explanation as to nature of proceeding. It is also waivable by respondent's counsel, no explicit requirement to be written:

MINN. STAT. § 253B.065 Subd. 2 (1998)

2 statutes require the respondent be given notice of Petition Filing ONLY, without time or date of hearing

ME. REV. STAT. ANN. tit. 34-B, § 3864(3)(a)(1) (West 1999)
MD. CODE ANN., HEALTH-GENERAL § 10-631(a), 10-631(b)(1) (1999)

1 statute requires service of only court Order for Detention Upon Arrest:

WASH. REV. CODE § 71.05.200(2) (1998)

1 statute requires only oral notice of nature of proceeding, time and date of hearing unspecified:

VA. CODE ANN. § 37.1-67.3 (Michie 1998)

2 statutes require that a respondent request that a hearing be called if he desires one:

N.Y. MENTAL HYGIENE LAW § 9.31(a) (McKinney 1999)
D.C. CODE. ANN. § 21-525 (1998)

1 statute does not mention notice, either oral or written:

S.D. CODIFIED LAWS § 27A-10,7.1 (Michie 1998)

STATUTORY REQUIREMENTS FOR WAIVER OF A RESPONDENT'S PRESENCE AT HEARING IN MENTAL HEALTH COMMITMENT PROCEEDINGS BY INDIVIDUAL STATE

The groups of states are listed in order of how protective they are of the respondent's rights, with the most protective appearing first and the least protective appearing last. Individual statutes are listed alphabetically within group.

2 statutes REQUIRE the respondent's presence at hearing unconditionally:

NEV. REV. STAT. § 433A-280 (1999)
W. VA, CODE § 27-5-4(g)(1) (1999)

1 statute implies respondent's presence at hearing is required without explicit mention:

OR. REV. STAT. § 426-096 (1997)

14 statutes explicitly prohibit waiver of presence at hearing by anyone excepting the respondent himself:

CONN. GEN. STAT. § 17a-498(f) (1999)
DEL. CODE ANN. tit. 16, § 5006(2)(ii) (1999)
GA. CODE ANN. § 37-3-81(5) (1999)
HAW. REV. STAT. § 334-329(j) (1999)
ME. REV. STAT. ANN. tit. 34-B, § 3864(5)(C)(1) (West 1999)
MASS. GEN. LAWS ch. 123 § 6(b) (1999)
MISS. CODE ANN. § 41-21-73(2) (1998)
MONT. CODE ANN. § 53-21-116 (1999)
NEB. REV. STAT. § 83-1056 (1999)
N.J. REV. STAT. § 30:4-27.14 (1999)
N.Y. MENTAL HYGIENE LAW §§ 9.31(c) (McKinney 1999)
1999 Pa. Legis. Serv. 4406(3)(i) (West)

TENN. CODE ANN. § 33-3-612(b) (1998)
WIS. STAT. ANN. § 51-20(2) (West 1994)

7 Statutes prohibit waiver of presence at hearing by anyone but respondent but are unclear as to actions necessary to affect it:

KAN. STAT. ANN. § 59-2959(c)(1999)
LA. REV. STAT. ANN. § 28:55(A) thru 20:55(D) (West 1999)
MINN. STAT. § 253B.08 Subd. 5(a) (1998)
MO. ANN. STAT. § 632.335(3) (West 1999)
N.M. STAT. ANN. § 43-1-11(B) (Michie 1978)
N.D. CENT. CODE § 25-03.1-14 (1999)
WYO. STAT. ANN. § 25-10-110(h) (Michie 1999)

2 statutes do not explicitly prohibit waiver of respondent presence at hearing, but imply that presence cannot be waived except with the respondent's consent:

R.I. GEN. LAWS § 40.1-5-8(i)(3) (1999)
VA. CODE ANN. § 37.1-67.3 (Michie 1998)

9 statutes do not mention waiver of respondent's presence at hearing:

ARK. CODE. § 20-47-214 (Michie 1996)
CAL. HEALTH AND SAFETY CODE § 5275-5278 (West 1999)
D.C. CODE ANN. § 21-525 (1998)
IND. CODE ANN. § 12-26-6-4 (Michie 1999)
KY. REV. STAT. ANN. § 202A.076 (Banks-Baldwin 1999)
MD. CODE ANN., HEALTH-GENERAL § 10-632 (1999)
N.H. REV. STAT. ANN. § 135-C:43 (1998)
1999 S.D. CODIFIED LAWS 27A-10.7.1 – 17A-10-11 (1998)
VT. STAT. ANN. tit. 18, § 7615(e) (1999)

1 statute mentions waiver of respondent's presence at hearing only by case precedent, which case does not address this issue:

Isham v. People, 82 Colo. 550, 262. P.82

8 statutes allow waiver of respondent's presence at hearing but only upon "informed consent" or upon "clear and convincing evidence" without further explanation of those terms:

ALASKA STAT. § 47.735(b)(1) (1998)
ARIZ. REV. STAT. § 36-539(C) (1999)
FLA. STAT. ch. 394.467(6)(b) (1999)
IDAHO CODE § 66-329(j) (1999)
OHIO REV. CODE ANN. § 5512.15(2) (Anderson 1989)
S.C. CODE ANN. § 44-17-550 (Law. Co-op. 1999)
TEXAS HEALTH & SAFETY ANN. § 574.031(c) (West 1992)
UTAH CODE ANN. § 62A-12-234(8)(b) (1999)

6 statutes give a respondent's attorney authority to exclude him or her in advance of hearing without showing of cause:

ALA. CODE § 22-52-9(1) (1975)
405 ILL. COMP. STAT. ANN. 5/3-806(a) (West 1999)
IOWA CODE ANN. § 229.12(2) (West 1999)
N.C. GEN. STAT. § 122C-268(e) (1998)
OKLA. STAT. tit. 43A, § 5-411(A)(5) (1998)
WASH. REV. CODE § 71.05.300 (1998)

1 statute allows a physician or health care professional to exclude the respondent from hearing if he or she feels their testimony might be detrimental to his or her health:

MICH. COMP. LAWS § 330.455(1) (1998)